BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185

TO: The Commission

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these reply comments in response to the *Notice of Inquiry* ("*Notice*") released by the Commission in the above-captioned proceeding.[1] In its comments, CompTel strongly urged the Commission to adopt rules and policies to ensure that competitive providers of telecommunications and information services, including Internet Service Providers ("ISPs"), have reasonable and non-discriminatory access to the cable modem platforms of incumbent cable operators. For the sake of brevity, CompTel limits its discussion here to the FCC's authority to impose open access requirements and to forbear from applying the requirements of the Act in accordance with Section 10.

I. THE COMMISSION HAS AMPLE AUTHORITY TO ADOPT OPEN ACCESS REQUIREMENTS FOR INCUMBENT CABLE MODEM SERVICE PROVIDERS

In its comments, CompTel demonstrated that the Commission has ample statutory authority to adopt minimum open access regulations for incumbent cable operators. The Commission's ancillary Title I authority allows the Commission to adopt targeted regulations designed to achieve its pro-consumer goals without imposing unnecessary burdens on incumbent

[1] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GN Docket No. 00-185, FCC 00-355 (rel. September 28, 2000) ("*Notice*").

cable operators or extending to non-dominant parties for whom no regulations are necessary. The Commission can reach effectively the same end-result through its Title II authority by adopting a rule that incumbent operators of cable modem platforms must offer the underlying transmission component as a telecommunications service to unaffiliated providers of telecommunications and information services, and exercising its forbearance authority pursuant to Section 10 with respect to unnecessary Title II requirements.

A. Cable Modem Platforms Are Capable of Providing "Cable Services," "Information Services" and "Telecommunications Services."

As can be expected, various parties sought in their opening comments to force cable modem services into the statutory definition that best serves their interests. For example, cable companies argue that cable modem platforms provide both "information services" and the "other programming" component of "cable services," but not "telecommunications services" or the "video programming" component of "cable services."[2] Therefore, they argue, services provided via cable modem platforms cannot be regulated under Title I or Title II, and are not subject to the leased access provisions of Title VI.[3] By contrast, local regulatory authorities claim that cable modem platforms provide only "cable services," which are subject to regulation by local regulatory authorities consistent with the provisions of Title VI.[4] Although these parties differ in the end result that they advocate, they all focus on selected portions of legislative history and ignore aspects of the statutory definitions, as well as the services that cable modem platforms are capable of providing, in order to reach their desired result.

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2 *See, e.g.,* Comments of AT&T Corp. at 6-24.

3 *Id.*

4 *See, e.g.,* Comments of the National League of Cities, the Texas Coalition of Cities for Utility Issues, the City of Palo Alto, California, and the City of Eugene, Oregon at 4-26.

CompTel respectfully submits that cable modem platforms are capable of providing "cable services," "information services" and "telecommunications services." The statute defines "cable service" as:

> "(A) the ***one-way*** transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[5]

The structure of the statutory definition of "cable services" makes clear that Congress intended to include only (1) **one-way** video programming; (2) other **one-way** programming services; and (3) subscriber interaction, if any, that is **required** for the selection or use of these **one-way** video programming or other **one-way** programming services.[6] Therefore, to the extent that a cable modem platform is configured such that only "one-way" services are available to subscribers, the "video programming" and "other programming service" that the operator of the cable modem platform makes available to all subscribers generally are "cable services" as defined by the statute.

In theory, cable modem platforms can be configured so that they are capable of providing only "cable services." In practice, however, nearly every cable modem platform is configured to provide "two-way" services, which Congress explicitly excluded from the definition of "cable services." For example, cable modem platforms provide their subscribers with the capability (1) to provide their own "video programming" and "other programming

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5 47 U.S.C. § 522(6). The Act in turn defines "other programming services" as "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14).

6 *See, e.g., Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 808-09 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.").

services" to other users of the Internet; (2) to send and receive e-mails; (3) to utilize instant messaging; and (4) to utilize remote access systems that are not available to the general public. These capabilities are explicitly excluded from the definition of "cable service" not only because they are "two-way" in nature, but also because they are not "required" for the selection or use of any **one-way** video programming or other **one-way** programming services that the operator of the cable modem platform might provide. Therefore, cable modem platforms provide their subscribers with services that do not fit the statutory definition of "cable services," if indeed they provide any cable services at all.[7]

Moreover, many services offered by cable modem platforms fit the statutory definition of "information services." The statute defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[8] The Commission has already found that Internet access services are information services.[9] Accordingly, many commentors, including AT&T, recognize that cable modem platforms offer information services.[10]

Further, the Commission has the authority to adopt a rule that incumbent cable operators must comply with minimum cable open access requirements by offering

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7 *See, e.g.,* Comments of AT&T Corp. at 19-20.

8 47 U.S.C. § 153(20).

9 *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 401 (1999); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11536 (1998) ("*Report to Congress*"). The facilities used to provide a service do not affect its classification under the Act. *See, e.g., Amendment of the Commission's Rules with Regard to the 3650-3700 MHz Government Transfer Band,* ET Docket No. 98-237; RM-9411; WT Docket No.: 00-32, ¶ 53 (rel. Oct. 24, 2000) ("Telecommunications services are defined as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.").

10 *See, e.g.,* Comments of AT&T at 20-21.

"telecommunications services" subject to Title II requirements. Every information service is provided over "telecommunications."[11] AT&T admits that cable modem services are provided over telecommunications facilities and that operators of cable modem platforms provide "telecommunications."[12] However, AT&T claims that it does not provide "telecommunications services" because the telecommunications component is provided on a private carriage basis.[13] The Commission should reject that claim. Just as the Commission in the past has imposed unbundling requirements on facilities-based information service providers,[14] the Commission can adopt a rule requiring AT&T and other incumbent cable operators to offer the telecommunications component as a common carrier service.[15]

B. The Commission Has the Authority To Impose Open Access Requirements.

Because the cable modem platforms provide cable, information and telecommunications services, the Commission has the authority to impose open access requirements, as CompTel explained in its initial comments.[16] AT&T claims that Sections 621(c) and 644 of the Act bar the FCC from imposing open access requirements.[17] Section

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11 *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-413, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, ¶ 37 (rel. Dec. 23, 1999) ("[E]ven though the access provided to the ISP by the local exchange carrier facilitates the delivery of an information service because of the "applications that ride on top" of the telecommunications service, that same access necessarily facilitates the origination of the underlying telephone toll service used to transport the ISP's Internet access service.").

12 Comments of AT&T at 20-25.

13 *Id.* at 20-24.

14 *See* Section I.C., *infra.*

15 *See, e.g., Independent Data Communications Manufacturers Association, Inc.*, 10 FCC Rcd 13717, ¶ 22 (1995).

16 Comments of CompTel at 31-46.

17 Comments of AT&T at 25-27.

621(c) provides that a "cable system shall not be subject to regulation as a common carrier or utility *by reason of providing any cable service.*"[18] However, the Commission would not impose open access requirements due to the cable services that a cable modem platform may or may not provide, but rather to foster competition in the information and telecommunications services market. Thus, Section 621(c) is inapplicable. Similarly, Section 624(f), which provides that "[a]ny Federal agency . . . may not impose requirements regarding provision or content of cable services, except as expressly provided in this title," is inapplicable because open access requirements would not affect the provision or content of cable services.

A few parties claim that the FCC cannot impose open access requirements because information services are unregulated and operators of cable modem platforms provide the telecommunications component on a private carriage basis.[19] However, the FCC can regulate providers of information services, which also provide telecommunications services, as explained in more detail below. Other commentors claim that the FCC "could not" exercise its Title I authority.[20] However, the FCC's decision to refrain from exercising its authority in certain cases does not limit its discretion to impose open access requirements here. Moreover, imposition of open access requirements would further numerous statutory goals, as CompTel explained in its initial comments.

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18 47 U.S.C. § 621(c).

19 *See, e.g.,* Comments of AT&T at 20-24.

20 *See, e.g., id.* at 27.

C. Extension of the Commission's Unbundling Requirements to Incumbent Cable Modem Operators Is Consistent With Policies Established in *Computer II* and *Computer III*

In its comments, CompTel explained that the adoption of cable open access requirements for incumbent cable operators would be similar to the FCC's decision years ago in the *Computer Inquiry* proceedings to require facilities-based providers of enhanced services to unbundle the underlying telecommunications and offer it as a tariffed service on a common carrier basis. The Commission rejected claims by facilities-based providers of information services that they were providing the underlying transport services on a private carriage basis rather than on a common carriage basis.[21] Accordingly, facilities-based providers of enhanced services were "treated" as regulated providers, and they traditionally have been subject to the Commission's Title II requirements.

By contrast, independent information service providers, including ISPs, that acquire underlying transport services from incumbent cable modem service providers should be treated as unregulated information service providers. This status is fully consistent with the Commission's decisions in the *Computer Inquiry* proceeding that value-added resellers may treat their entire service package as an enhanced service under the theory that the enhanced service "contaminates" any resold basic services included in the package. However, incumbent operators of cable modem services, which are facilities-based providers of information services, should be subject to open access obligations just as the Commission has imposed unbundling and Title II requirements on facilities-based providers of enhanced services.

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[21] *See, e.g., Independent Data Communications Manufacturers Association, Inc.*, 10 FCC Rcd 13717, ¶ 22 (1995).

II. THE COMMISSION MAY EXERCISE ITS FORBEARANCE AUTHORITY ONLY IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 10 OF THE ACT

In its comments, CompTel emphasized that the Commission could use its forbearance authority under Section 10 to eliminate any Title II requirements that it believes are not necessary to secure the goals of open access, as well as to limit its rules only to incumbent cable operators. Congress enacted Section 10 to ensure that the Commission only exercises its forbearance authority under certain conditions. The Commission has recognized that the requirements of Section 10 must be met before it forbears from applying the requirements of the Act, and has repeatedly held that Section 706 does not constitute an independent grant of forbearance authority or of authority to use other regulatory methods.[22]

In conflict with the explicit terms of the statute and the Commission's previous holdings, a few commenters have incorrectly suggested that the Commission does not need to meet the requirements of Section 10 in order to forbear from applying the requirements of the Act.[23] These commenters urge the Commission to reconsider its previous holdings that Section 706 does not provide an independent grant of forbearance authority. Specifically, they claim that the Commission "overlooked" Section 706(b) when it held that Section 706 does not provide an independent grant of forbearance authority.

The suggestion that the Commission "overlooked" Section 706(b) each time it rejected arguments that Section 706(b) is an independent grant of forbearance authority is

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22 *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, ¶¶ 10-11 (rel. Aug. 21, 2000).

23 *See, e.g.*, Comments of the United States Telecom Association, GN Docket No. 00-185, 9 (filed Dec. 1, 2000); Comments of the Progress & Freedom Foundation, GN Docket No. 00-185, 12 (filed Dec. 1, 2000).

incorrect. The Commission fully considered Section 706(b) when it determined that Section 706 directs the FCC to use, among other authority, its forbearance authority under Section 10(a) to encourage the deployment of advanced services.[24] The Commission also considered 706(b) when it determined that interpreting Section 706 as not providing independent forbearance authority will better promote Congress' objectives in the 1996 Act than would a contrary interpretation. Accordingly, the few comments that urge the FCC to reconsider its interpretation of Section 706, to a large extent, merely reiterate arguments that the FCC has fully addressed and properly rejected. These comments provide no reason for the FCC to alter its interpretation of Section 706 here. Therefore, CompTel urges the FCC to reject requests that it revisit its conclusion that Section 706 does not constitute an independent grant of forbearance authority.

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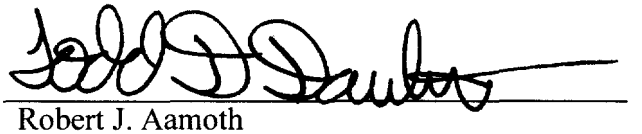
[24] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, 2000 FCC LEXIS 4152, ¶¶ 6-9 (rel. Aug. 04, 2000).

CONCLUSION

CompTel respectfully submits that the Commission should promptly commence the rulemaking proceeding described herein.

Respectfully submitted,



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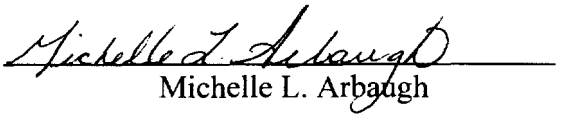

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*Via Regular U.S. Mail